

respondent and Puan Tay Hor Tee for sale of the 14 lots for a total consideration of \$65,000 which would be at approximately \$920 per acre. Subsequently on December 2, 1969 the original vendors and respondent and Puan Tay Hor Tee executed Form 14A in respect of the 14 lots. In his affidavit dated October 10, 1972 Tai Ah Kau @ Tai Kian Cheong has said that the original vendors had insisted that the price agreed between them should appear on Form 14A in respect of all the lots even though the actual price for the 14 lots was much lower and that he had been able to sell the 14 lots at a lower price than what was agreed with the original vendors because he had sold some other lots at a higher price. Tan Leng Teck, the advocate & solicitor who attested Form 14A, has said that respondent and Puan Tay Hor Tee had agreed to buy the 14 lots for \$65,000 as stated in Exhibit A4 and that the 14 lots were transferred to respondent and Puan Tay Hor Tee on payment of \$63,550 as evidenced by the 3 receipts (Exhibits A5, A6 & A7). There was a rebate of \$1,450 which made up the price of \$65,000.

I am therefore of the opinion that on the facts before the Special Commissioners there was evidence to support their decision and that their decision was correct in law. I therefore dismiss the appeal with costs and confirm the order of the Special Commissioners.

Appeal dismissed.

Solicitor: *Ting Poi Teck.*

**RM. P. RM. P. V. PALANIYAPPAN v.
N.P.L. ST. M.V. RAMANATHAN CHETTIAR**

[O.C.J. (Abdul Hamid J.) April 27, 1976]

[Kuala Lumpur Originating Motion 7 of 1972,
Originating Summons No. 136 of 1966 and
Originating Motion No. 47 of 1973]

Probate and Administration — Will executed abroad — In what circumstances copy can be admitted to probate — Whether parcener in Joint Hindu Family can make a will — Effect of adoption — Whether Hindu law in India applicable — Testator domiciled in India and making Indian Will — Probate and Administration Ordinance, ss. 25, 34, 77A — Courts Ordinance, s. 105(2).

Hindu Law — Joint Hindu family — Whether sole proprietor can dispose of properties by will — Effect of adoption — Applicability of law in India — Testator domiciled in India and making Indian will — Hindu Succession Act, 1956.

The applicant made an application for the revocation of a grant of probate of the will of Valliappa Chettiar (deceased). The will was executed in India and one of the questions in dispute was whether the original of the will was produced when probate was granted by the Senior Assistant Registrar to the executor named in the will (the respondents) limited until the original was admitted to probate. The other question raised was whether the deceased as sole parcener of the property had power to dispose of the property by will under Hindu Law. The applicant had been adopted by the widow after the original grant of probate had been made.

Held: (1) as the will was executed in India the question of its validity should be determined in accordance with the relevant Indian law. In this case the question of the validity of the will had been determined in India in accordance with

A Indian law and it was proper for the court to take cognizance of this fact. There was therefore no merit in the applicant's contention that the alleged will was invalid;

(2) in this case on the facts the original will had been produced and it was inspected and compared on the instruction of the Senior Assistant Registrar and it is reasonable to conclude that the Senior Assistant Registrar was satisfied that the requirements of section 25 of the Probate and Administration Ordinance were complied with before he proceeded to make the order to issue grant of probate limited until the original was admitted to probate;

B (3) as sole parcener and absolute owner of the properties both in India and Malaysia the deceased was entitled to dispose of such properties by will;

C (4) as the testator was domiciled in India and had made an Indian will, all questions of succession must be determined by Indian law. The Hindu Succession Act, 1956 therefore applied to the disposal by the deceased by will of his immovable properties in Malaysia;

D (5) the applicant was not the deceased's adopted son at the time of the deceased's death. As the deceased was the absolute owner of the properties both in India and in Malaysia at the time of his death and was entitled to dispose of such properties in his will, there was no ground to warrant a finding that the ownership of the properties so disposed had not absolutely passed. The widow inherited the properties disposed of by will absolutely as from the time of the death of the testator;

(6) the application for revocation must necessarily fail and must be dismissed.

Cases referred to:-

- E (1) *Udham Singh v. Indar Kaur* [1971] 2 M.L.J. 263.
(2) *Bhim Sen v. State of U.P.* A.I.R. 1955 S.C. 435 at p. 436.
(3) *Tulasi Ammal v. Danalakshmi Ammal* A.I.R. 1934 Mad. 316.
(4) *Re Venkatachala Pillai & Ors.* (1889) 10 I.L.R. Madras 154.
(5) *Palaniappa Chettiar v. S. Solai* [1961] M.L.J. 283.
F (6) *Liaw v. Blikas* [1965] 2 M.L.J. 9.
(7) *Re Tang Pui Sim* [1967] 2 M.L.J. 96.
(8) *Attorney-General v. Valliamum Atchie* 2 Ceylon Tax Cases p. 371.
(9) *Re Estate of T.M.R.M. Vengdasalam Chettiar, deceased* [1940] M.L.J. 155; [1941] M.L.J. 120 C.A.
(10) *Lal Bahadur v. Kanhaia Lal* 34 I.A. 65.
G (11) *Attorney-General of Ceylon v. A.R. Arunachalam* (No. 2) [1957] A.C. 540; [1958] M.L.J. 43.
(12) *Smt. Sitabhai v. Ramchandra* A.I.R. 1970 S.C. 343.
(13) *C.S. Nataraja Pillai & Anor. v. C.S. Subbaraya Chettiar* A.I.R. 1950 P.C. 34.
(14) *In re Valentine's Settlement, Valentine & Ors. v. Valentine & Ors.* [1965] 1 Ch. 831.

H ORIGINATING MOTION.

V.K. Palasuntharam (Mrs. Cecilia Fernandez with him) for the applicant.

M. Shankar (Mrs. Shanta P. Menon with him) for the respondent.

I **Abdul Hamid J.:** On February 24, 1972 the applicant R.M.P.R.M.P.V. Palaniyappan formerly known as Alagappan s/o Valiappa Chettiar (I shall hereafter call "the applicant") filed an Originating Motion (O.M. 7/72) asking that the order of the Senior Assistant Registrar of August 9, 1960 and the issue of grant of probate dated February 20, 1961 to the respondent N.P.L.ST.M.V. Ramanathan Chettiar (I shall hereafter call "the respondent") be revoked.

The applicant filed an affidavit in support and subsequently filed further supplementary affidavits. The main grounds relied upon by the applicant are: —

- (a) That by reason of adoption under adoption deed dated June 7, 1962, he is a beneficiary of the immovable properties of the deceased Valliappa Chettiar in Malaysia held in the name of the deceased being the "Karta" of the joint Hindu family;
- (b) That the grant of probate was improperly issued by the Senior Assistant Registrar as the original will was never produced to the court to support the petition;
- (c) That by reason of certain irregularities, namely, notice of hearing, inadequacy of time required by law between service of notice and date appointed for hearing, the Senior Assistant Registrar had no power on August 9, 1960 to make the order and therefore the order was invalid; and
- (d) That the irregularities and non-production of the original will were not known to him until late November 1971.

It is the respondent's case that: —

- (1) The original will was produced together with a certified copy and for this purpose he is relying on —
 - (a) Affidavits of H.E. Chan, S.A. Samy and the respondent of February 25, 1976;
 - (b) Oral evidence of the respondent under cross-examination; and
 - (c) Evidence disclosed during re-examination of the applicant by his counsel that the original will was produced when the petition was presented.
- (2) There was a delay in the application for revocation. The applicant's solicitors knew of the presentation of the original will as early as 1966; same allegation on oath was made that the grant of probate was improper (see Appeal Record XI/1968) and the applicant did not file the application for revocation until 12 years later.
- (3) The Senior Assistant Registrar had power and did properly act under section 25 of the Probate and Administration Ordinance, 1959; and
- (4) As regards time for posting of notice there is no rule providing the length of time.

The petition for probate was filed on August 8, 1960 (Petition No. 197/60) supported by affidavit of the petitioner/respondent and an order was made granting the probate to the executor (respondent) named in the will limited until the original is admitted to probate in accordance with section 25 of the Probate and Administration Ordinance No. 35/59 (I shall hereafter call "the Ordinance"). On February 24, 1972 the applicant applied for revocation of the issue of the grant of probate. On August 7, 1973 the respondent filed a notice of motion for an order that the original be admitted to probate as directed by the order of the Senior Assistant Registrar made on August 9, 1960.

Mr. V.K. Palasuntharam counsel for the applicant submitted that the burden of proof is on the propounder of the will. He referred to *Udham Singh v. Indar Kaur*.⁽¹⁾ In that case the plaintiff/appellant alleged that the testator had no testamentary capacity. The issue was raised in the application for a revocation of the grant of probate. The question of the validity of the will came up for consideration upon an order made directing a trial to determine the same. The court held that the burden of proving testamentary capacity rested on the person alleging the validity of the will.

I accept the correctness of the Federal Court decision. However, I shall have to bear in mind that the application before the court is essentially one for revocation of the grant of probate and there was no direction as such to determine the validity of the will. Furthermore in that case the determination was in relation to a will executed within the court's jurisdiction. In the applicants' affidavit of February 24, 1972 he stated that the question whether the alleged will is genuine or is a forgery is still *sub judice* in the courts in India. In reply the respondent stated in his affidavit of February 25, 1976 that the issues regarding the will and the position of the applicant in respect of the same taken by the applicant in India were decided upon by the courts in India following the order made by the High Court in Madras on April 27, 1967 by Mr. Justice Ramaprasada Rao and the order of Manarajan J. on August 6, 1971. It is averred that the applicant was at the time of filing the affidavit fully aware of these orders but had nevertheless made an allegation that the genuineness of the will is still *sub judice* in the courts in India. In the affidavit dated March 1, 1976 the applicant disputed that the courts in India gave any decision on the merits of his claim. The applicant contended that his claim in India was to a share in the properties in India held in the name of the deceased and it was dismissed because he was unable to pay court fees. He asserted that it is well-known to the respondent that he is an interested party contesting the genuineness of the alleged will.

Counsel for the applicant quoted the law governing the making of a valid will and proceeded to submit that if the respondent had tried to prove the will in India, the case of *Bhim Sen v. State of U.P.*⁽²⁾ would apply. Counsel dealt with the statutory requirements requiring signature of attesting witnesses and questioned whether the deceased himself signed the alleged will. He urged the court to hold that the respondent never sought to take out probate in the Indian Court and that the respondent has never proved the will and as such his application for admitting the alleged original will should be refused. In that event the probate issued pursuant to the order of August 9, 1960 should also be revoked.

Mr. Shankar counsel for the respondent argued that the respondent is relying on the affidavit in support of the petition for probate where one of the witnesses to the will, one Ganapathy Aiyer, had affirmed and declared that he was present and saw the testator affix his signature thereto in his presence. In addition there was also the affidavit of the respondent in

Civil Suit No. 1138/66 (see Appeal Record XI/1968 page 43) where he stated that the will was registered in the office of the Sub-registrar Thirumaiyam under Will Case No. 1/1960 on April 1, 1960 and nobody challenged the authenticity of the will despite wide publicity. (See page 54 of the Appeal Record).

Looking at the judgment of Ramaprasada Rao J. in the High Court of Judicature at Madras in Civil Revision Petition No. 1660/66 on April 27, 1967 it is revealed that pursuant to the will executed by the deceased, the respondent applied in the lower court for the issue of succession certificate to enable him to collect debts covered and included in the said will, and when the petition was made, the applicant/petitioner filed an affidavit in the nature of consent affidavit sworn on September 18, 1964 which reads — "The petitioner has filed the above application (O.P. No. 6 of 1964) for obtaining succession certificate to collect the decree debts mentioned in the schedule thereto. I express my consent and willingness to the grant of Succession Certificate in favour of the petitioner."

Ramaprasada Rao J. stated that with reference to the petition he considered the petitioner's contention "that the will which he accepted as correct and existing in September 1964 was a forged one and he therefore wanted to be impleaded in these proceedings for the issue of a succession certificate so that he could place his contentions against such a grant." The learned judge expressed the view that the learned District Munsif "need not have so fully inquired into this matter which merited no consideration at all in view of the sworn affidavit of the petitioner in 1964, yet heard the petitioner in full, gave his reasons as to why and in what circumstances the plea of the petitioner to be impleaded in the proceedings under the Succession Act need not be countenanced." The learned judge held that "While agreeing with every one of the reasons stated by the lower court, I may add that this application of the petitioner to question the validity of the will is absolutely mischievous and cannot bear scrutiny at all. The petitioner cannot blow hot and cold, approbate and reprobate, and seek the assistance of court to trifle with his machinations from time to time. The petition to implead himself as a party, in the circumstances stated above, is absolutely misconceived, and in my opinion, is even maintainable, as he cannot be allowed to say one thing at one time and quite a contrary thing at another time in the same proceedings."

Counsel for the respondent also drew court's attention to Civil Suit No. 1168/66 where the same question was raised by the applicant. The suit was dismissed for want of prosecution. It is the respondent's contention that *res judicata* applies as the judgment was between the same parties.

In the present case it is necessary to bear in mind that the will was executed in India and therefore the question of its validity should properly be determined in accordance with the relevant Indian law. If in a judicial proceeding in India, at any rate if this court is satisfied, the validity of such will could be but had not been disputed, it is, I think, proper for the court

A in this country to take cognizance of this fact. On the materials before the court I am satisfied that the question of the validity of the will has been determined in India in accordance with Indian law. It is apparent from the judgment of Ramaprasada Rao J. that he was satisfied the learned District Munsif heard the petitioner in full and had given his reasons as to why and under what circumstances the plea of the petitioner to be impleaded in the proceedings under the Succession Act need not be countenanced. As for the applicant's contention that the respondent never sought to take out probate in the Indian Court although there is provision in the Indian Succession Act I am satisfied that it was not legally necessary or incumbent upon the respondent after the issue of the succession certificate to apply for the grant of probate. Moreover the court cannot ignore the fact that the applicant had consented to the issue of the succession certificate and that his court action to implead himself as a party to the proceedings contending against such grant on the ground that the will was a forged one had been dismissed.

D When the applicant was cross-examined he admitted he knew of the existence of the will even before the adoption in 1962. He however denied that in 1964 he accepted the will as correct consenting to the issue of succession certificate. He further denied that he signed the affidavit to that effect. Nevertheless the applicant did not specifically deny that the issue regarding the will and his position in respect of the same taken by him were decided upon by the courts in India. Instead he averred in paragraph 4 of the affidavit sworn on March 1, 1976 that the deceased had no power of testamentary disposition by virtue of the Hindu Succession Act over immovable properties in West Malaysia. Upon such averments I am inclined to infer the applicant is not contesting that the deceased had power to dispose of immovable properties in India under the will.

In the circumstances and on the materials before the court I find no merit in the applicant's contention that the alleged will was invalid.

G It is convenient at this point to deal with the applicant's contention that the order made by the Senior Assistant Registrar was void and of no effect. The respondent submitted that the power of the Senior Assistant Registrar to grant probate was contained under section 77A. This was clearly in error. This section was only inserted by Act A128/72 with effect from June 23, 1972. At the relevant date the Senior Assistant Registrar's power was to be found under section 105 of the Courts Ordinance, 1948. Under sub-section (2) of section 105, a Senior Assistant Registrar was, in 1960, empowered to hear and determine applications for, and to grant, probate in all cases which are uncontested. Apart from section 105(2) of the Courts Ordinance, 1948, it seems clear that under the Probate and Administration Ordinance the power to issue grant of probate lay with the court — defined under the Ordinance to include, in cases where they are empowered to act, the Registrar and Assistant Registrar of the Supreme Court. Looking at the order made pursuant to the Petition of Probate No. 197/60, it can clearly be inferred that the Senior Assistant Registrar had acted pursuant to section 25

of the Ordinance. Before I examine the effect of this section it is appropriate, at this point, to consider the applicant's contention that, at the material time, the rule applicable was rule 29 of the 1916 Rules contained in the F.M.S. 1935 Rules. The relevant portion of rule 29 reads —

"The will... or testamentary paper shall appear on the face of it to be a complete document;... if the paper purport on the face of it to be... the copy of a will... it must *prima facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate."

Mr. Palasuntharam argued that the copy of the purported will must *prima facie* be considered as an incomplete document within the meaning of rule 29 and therefore the respondent was not entitled to grant of probate. Counsel proceeded to argue that under section 25 of the Ordinance what could be granted was a limited grant, and, if a limited grant were to be granted to the respondent under rule 35 of the 1916 Rules, the matter should have been referred for direction by a judge. Rule 35 provides that

"No person entitled to a general grant of administration of the estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge."

To my mind section 105(2) of the Courts Ordinance, 1948 has empowered the Senior Assistant Registrar to hear and determine applications for probate in all cases which are uncontested and by reason of the said section and also the power provided by the Ordinance the Senior Assistant Registrar had properly heard and determined the petition for the grant of the probate. The petition was an uncontested petition, and, provided the Senior Assistant Registrar was satisfied there was sufficient reason the will could not be produced and provided further the copy produced was identical in terms with the original, he had in my view, properly invoked section 25 of the Ordinance to grant probate limited until the original is admitted. In my judgment, rule 35 has no application in the present case in view of section 25. I cannot construe section 25 as having imposed a limitation upon the Senior Assistant Registrar's power to grant probate limited until the original will is admitted to probate. In effect I am constrained to hold that the section which is a substantive provision prevails over rule 35.

In any event assuming there were some irregularities I am inclined to think that on the evidence before the court I am competent to decide on the admissibility of the original will. So long as the court has no reason to believe that the original will may not properly be admitted I would envisage that this is sufficient to cure the irregularities, if any.

It is the applicant's contention that there was no evidence to show that conditions under section 25 were satisfied, alternatively, if the original will was produced, the Senior Assistant Registrar had no jurisdiction under section 25 to act. I find no substance in the argument. The Senior Assistant Registrar recorded that he acted pursuant to section 25 of the Ordinance. Before invoking the section it was necessary for the Senior Assistant Registrar to be satisfied that the copy or draft produced by the respondent was identical in terms with the original. Counsel seems to have attached special meaning to the word "produced." This is clearly in error. It is plain that

A the section contemplates the production of a copy in the sense that it should be filed with or annexed to the petition. To satisfy the further condition of section 25, namely, that the copy should be identical in terms with the original, it became necessary that the original will should also be produced, that is, "to bring forward for inspection" (see *Shorter Oxford English Dictionary*), for comparison.

B The immediate question that arises for consideration is whether the original will, as maintained by the respondent, was produced for inspection and comparison. The applicant disputed it was produced. On the other hand the respondent maintained that it was produced for inspection and comparison and as it was needed elsewhere it could not be filed or deposited in court.

C Mr. Palasuntharam argued that the mention of section 25 of the Ordinance implies that the will was not produced. He submitted that the endorsements on the reverse of page 3 of the original will are not found on the copy of the will annexed to the petition (Exhibit D7). He further submitted that commencing from that part of the translation filed with D7 under the heading "The seal of Sub-registrar Thirumaiyam" there is no corresponding part in D6 itself. It is the applicant's contention that when the document was translated, there was one other page and that page was not filed with the petition. Counsel argued that D if the translation was of the original will, as alleged by the respondent, there should be some oral evidence by the respondent that he had given the original will through the solicitors to the court for translation.

E I have examined very carefully the documents referred to. There were some discrepancies but I fail to see how such discrepancies can be said to be relevant. Mainly the court is to consider whether the body of such copy is identical with the body of the purported original will. I share the view expressed by Mr. Shankar that the endorsements relate to the proceeding before the Sub-registrar at Thirumaiyam and they do not constitute the will itself. In the circumstances it is my view that one of the requirements of section 25 of the Ordinance had been sufficiently complied with if the copy of the will was indeed found to be identical in terms with the original.

G Now, whether the original will was produced for inspection and comparison before the Senior Assistant Registrar must, I think, be determined on the materials before me. Upon such materials I am satisfied that the original will was produced for inspection and comparison. In the affidavit affirmed on April 10, 1972 the respondent stated that the applicant was aware that probate was obtained in the High Court after the original will and a certified true copy were produced to the court and the original compared with a certified copy. Mr. H.E. Chan, an advocate and solicitor of the High Court, a partner in the firm of Shearn, Delamore & Company affirmed that before probate was granted, he was handed the original will together with a printed copy in Tamil certified to be a true copy by the relevant authority in India. He also affirmed that on August 9, 1960 he did personally produce both the original will and the printed copy

to the Senior Assistant Registrar and explained to him that they were applying for probate limited until the original is admitted to probate because he had received instruction that the original will could not be deposited in court as it was required in India in connection with the affairs there. Mr. Chan further affirmed as follows —

"7. The Senior Assistant Registrar then instructed Mr. W.P. Sarathy to compare the original after he was satisfied that the printed copy certified by the Indian authority to be a true copy was in fact a true copy.

8. I then left the Registry and from information received by my clerk Mr. S.A. Samy I verily believe that Mr. W.P. Sarathy did so compare the original will with the copy thereof aforesaid and satisfied himself as instructed.

9. I annex to this Affidavit and marked HEC 1 is a photo copy of the original Will which I handed to the Senior Assistant Registrar as aforesaid.

10. I personally attended before the Senior Assistant Registrar on August 9, 1960 and obtained Probate in this matter but limited until the original Will was admitted to Probate.

11. On February 28, 1966 I did send the Applicant's Solicitors a letter which is annexed hereto and marked HEC 2.

12. I crave the leave of the court to refer to paragraph 5 of that letter in which notice was given to the Applicant's Solicitors that Probate had been obtained by us only after the original Will had been presented to the court and compared with the certified copy."

Mr. S.A. Samy also affirmed an affidavit on February 25, 1976 the contents of which support the averments made by Mr. Chan in his affidavit.

In the circumstances of this case it is also apparent that the applicant was fully aware that the original will was produced for inspection and comparison as far back as 1966 although under cross-examination he denied it.

In so far as the averments made by Mr. Chan and Mr. S.A. Samy they do not seem to have been disputed by the applicant. In the final analysis I form the view that the original had been produced and the same was inspected and compared on the instruction of the Senior Assistant Registrar and it is reasonable to conclude that the Senior Assistant Registrar was satisfied that the requirements of section 25 of the Ordinance were complied with before he proceeded to make the order to issue grant of probate limited until the original is admitted to probate.

That brings me to the next question raised by the applicant, namely, whether the Sub-registrar under the Indian Registration Act is a court. Mr. Palasuntharam argued that the Sub-registrar is not a court. He cited the case of *Tulasi Ammal v. Danalakshimi Ammal*.⁽³⁾ After careful consideration I find that I cannot accept the case as an authority for saying that the Sub-registrar is not a court. In that case the question that arose for consideration was whether a testator or writer could be complained against under section 195 of the Penal Code. The decision was founded upon the construction of both section 195 of the Penal Code read in conjunction with section 476 of the Criminal Procedure Code. Mr. Shankar, on the other hand, cited the case of *Venkatachala Pillai & Ors.*⁽⁴⁾ (Appellate Criminal) where Brandt and Parker J.J. held that a Sub-registrar acting under section 41 of the Registration Act, 1877, is a "Court" within the meaning of section 195 of the Code of

A Criminal Procedure. At page 158 Parker J. delivering the judgment of the court said —

"A Sub-registrar is legally authorised to take evidence under Part VIII of the Indian Registration Act for the purpose of satisfying himself upon certain points, and he is, therefore, when acting under section 41, Act III of 1877, a 'court' within the meaning of the Indian Evidence Act."

B Mr. Palasuntharam also argued that as the Sub-registrar is not a "Court" his seal cannot therefore be taken cognizance of by this court and consequently section 27 of the Ordinance cannot operate. The relevant part of section 27 reads —

C "When a will has been proved and deposited in a court of competent jurisdiction beyond the limits of Malaysia, and a properly authenticated copy of the will is produced, probate may be granted of such copy...."

Looking at the section I find it abundantly clear that this section cannot apply to the present case. There was no question whatsoever of the Senior Assistant Registrar acting upon an authenticated copy of the will and the question of granting probate upon such copy did not at all arise.

D The only remaining point raised in connection with the Senior Assistant Registrar's order is that sufficient notice had not been given. Mr. Palasuntharam referred to Order 52 rule 17 which provides that "Unless the court or a judge gives leave to the contrary, there must be at least two clear days between the service and the day appointed for hearing of the petition." The petition was heard in this case by the Senior Assistant Registrar, a "Court" as defined under the Ordinance, and, as the court itself had heard the petition there appeared to be no further necessity for such leave to be obtained. In any event, in view of Order 70 rule 1 and 2 of the R.S.C. non-compliance, if any, in the circumstances of this case should not have rendered the proceedings void.

F Before I finally state my finding, it may be useful to refer to the law affecting application for revocation of probate. It is settled law that the court may revoke any probate if it is satisfied that there is sufficient cause to do so (section 34 of the Ordinance). The onus, I think, is on the applicant to establish that there is sufficient cause for the revocation. What constitutes sufficient cause would, to my mind, depend upon the circumstances of each particular case. An interest in the property, e.g. one of the beneficiaries of the estate, may constitute sufficient cause; *Palaniappa Chettiar v. S. Solai*;⁽⁵⁾ similarly where administration is granted to the wrong person, *Liaw v. Blikas*.⁽⁶⁾ Where the grant is properly made no revocation will be allowed at the instance of persons who are neither next-of-kin nor having any interest in the estate of the deceased. (See *Re Tang Pui Sim*;⁽⁷⁾).

H On the facts before me I am not satisfied that the applicant derives any beneficial interest under the will. The deceased's properties passed under the will to the wife and daughter. The applicant's interest will only relate to some future interest, if there is any merit at all, in the widow's estate and not the deceased's estate. I will deal with this point at some length further on in my judgment. Furthermore the will specifically appointed the respondent as the sole trustee and executor. Therefore, without labouring

at length on the numerous and irrelevant grounds raised by the applicant, I would, for reasons that I have and will set out in my judgment, hold that this application is completely without merit and would therefore disallow this application.

I now turn to the further contention by the applicant that even if the revocation is not allowed then the applicant's status would come up for decision and his interest in the property should be ascertained whether he is now a coparcener of the immovable properties held in Malaysia in the name of the deceased or whether by virtue of the adoption deed he now has a joint interest for the enjoyment of the properties in Malaysia earlier held in the name of the deceased, or whether by virtue of the adoption deed he now has an interest in the preservation of the widow's share, if she has any, in the Malaysian properties under the alleged will of the deceased.

Mr. Palasuntharam submitted that the will purports to dispose of property between daughter and widow and also purports to affect Malaysian property of the deceased. He pointed out that the power of testamentary disposition of a Hindu under the Hindu Succession Act, 1956 cannot apply to immovable properties in Malaysia in view of the conflict of laws. In other words, with regard to joint Hindu family the person in whose name the property is held has no power of testamentary disposition. Mr. Palasuntharam referred to section 30 of the Hindu Succession Act, 1956 which provides —

"Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925) or any other law for the time being in force and applicable to Hindus."

He also referred to section 6 of that Act which reads —

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

It is submitted that by virtue of these sections the Assistant Comptroller of Estate Duty Madurai held (P2) that deceased had testamentary power over deceased's property in India and all his movable properties for purposes of Estate Duty Act, 1953 of India. It is also submitted that it affects movable properties anywhere but not immovable properties. Therefore the Act has no effect on immovable properties in Malaysia. Mr. Palasuntharam cited *Halsbury's Laws of England* Vol. 8 4th edition under the chapter "Conflict of Laws" paragraph 689 page 460 the second part of which reads —

"The material or essential validity of a will of immovables is governed by the *lex situs*. This law has been applied to such questions as whether the testator is bound to leave a part of his immovable estate to his widow or children, whether a gift of immovables to a charity is valid, whether a gift of immovables infringes the rule against perpetuities or accumulations, and to questions concerning the nature and incidents of the estates created in the immovables." (See also paragraph 654 page 442).

A Mr. Palasuntharam cited the case of *Attorney-General v. Valliamma Atchie*.⁽⁸⁾ In that case the deceased was a member of a Hindu undivided family and the question that arose for consideration was whether the property held in his name was exempt from estate duty. He drew court's attention to a passage at page 370 where Gratiaen J. said —

B "It is an essential feature of the law of South India relating to the joint property of a Hindu undivided family that on the death of any member of the family the remaining members take not by survivorship but by survival. In the case of movable property situated in Ceylon and belonging to a Hindu undivided family, no difficulties arise on the death of a member of this family, because the law applicable would be the law of the deceased's country of domicile. In the case of immovable property, however, the laws of the country of domicile would not govern the case."

C It is maintained that the case supports the applicant's contention that the Hindu Succession Act, 1956 of India has no effect on immovable properties outside India, or to put it in another way, Hindu law, unaffected by the Hindu Succession Act, applies to immovable properties belonging to joint Hindu family. Mr. Palasuntharam then cited the case of *re Estate of T.M.R.M. Vengadasalam Chettiar, Decd.*⁽⁹⁾ to show what constitutes joint Hindu property. He argued that the letter from Chari & Company (Ex. D2) really proves the applicant's case. May I first of all refer to D1 — a letter from the Comptroller of Income Tax Malaya addressed to Messrs. Chari & Company seeking information, amongst other things, whether the business, referred to as "this business", belongs to a Hindu undivided family and, if the business does not belong to a Hindu undivided family, the sources of capital with which the business was originally started. Exhibit D2 a reply from Chari & Company stated that "this business" does not belong to a Hindu joint family and that the capital is stated to have been introduced from ancestral funds only and there has been no partition in the family as the taxpayer (deceased) was the only male issue of his father and had inherited the properties from him.

It is the applicant's contention that the property was ancestral property and once it is ancestral property, or, if it was built from a nucleus of ancestral property, it is joint Hindu property and, consequently, if it is joint Hindu family property, such property cannot be disposed of by will. Counsel cited the case of *Lal Bahadur v. Karhaia Lal*⁽¹⁰⁾ where it is held that ancestral property or property built from a nucleus of ancestral property is joint Hindu property and cannot be disposed of by will.

H The question the court is to consider at this point is whether the deceased's immovable properties in Malaysia are joint Hindu property. The onus, to my mind, is upon the applicant. As against the applicant's contention, Mr. Shankar argued that the deceased was an Indian testator and the will was an Indian will. He further argued that Indian law was founded on the following propositions — (a) that a sole parcener has absolute power to dispose by will; (b) even ancestral property is disposable by sole coparcener; and (c) once the widow inherited under the will the character of the property is converted from ancestral to ordinary property. It is the respondent's contention that the widow inherited under the will

absolutely. As for D2 it is submitted that this proves that deceased was a sole coparcener domiciled in India and at the time when he executed the will in India he had no son. It is also submitted that where a testator domiciled in India made an Indian will all questions of succession must be determined by Indian law.

I have scrutinized very carefully the cases cited by Mr. Palasuntharam and the legal propositions that he has advanced in support of the applicant's contentions. Before I proceed to make any finding it is pertinent to observe that in the instant case the court ought to have regard to the fact that when Valliappa Chettiar died, he was the sole parcener not only in respect of properties in India, movables and immovables, but also in Malaysia. It is also necessary to bear in mind that the applicant was not adopted until 1962. Under the will the deceased specifically directed that his widow and daughter shall inherit the properties both in India and Malaysia.

Mr. Palasuntharam went on to cite the case of *Attorney-General of Ceylon v. A.R. Arunasalam* (No. 2)⁽¹¹⁾ to support the applicant's contention that although there is only a sole surviving coparcener and he may be called owner nevertheless the ownership is only a qualified ownership. To determine whether the case is applicable to the present case it seems necessary to analyse the facts upon which the decision was arrived at.

In that case Arunasalam Chettiar and his son constituted a joint Hindu family governed by the Mitakshara school of Hindu law. The father and son were domiciled in India and had trading and other interests in India, Ceylon and other eastern countries. The undivided son died in 1934 and Arunasalam became the sole surviving coparcener in the Hindu undivided family to which a number of female members belonged. When Arunasalam died in 1938 he was at his death a member of the Hindu undivided family, the same undivided family which his son when alive, was a member and of which the continuity was preserved after Arunasalam's death by the widows of the family and since the undivided family continued to persist, the property in the hands of Arunasalam as a single coparcener, was the property of the Hindu undivided family. What Arunasalam owned was joint family property.

The principle of law laid down in that case, must clearly be viewed in the light of the facts of that case. This is evident from the judgment itself where the Judicial Committee stated as follows —

"It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it could be determined whether the family property could properly be described as 'joint property' of the undivided family."

The facts of the present case differ very materially from the facts of Arunasalam's case and also the facts in the case of *Smt. Sitabai v. Ramachandra*⁽¹²⁾ which follows the decision in *Arunasalam's case*, *supra*.

In the final analysis the question that really calls for determination is whether, after considering the nature and character of the rights of the deceased

A and, if any, the rights of any other member of the undivided family, the family property could properly be described as joint property of the undivided family. The main consideration is whether, in the circumstances of the present case, the properties owned by the deceased Valliappa Chettiar during his lifetime, immediately before he died, at the time of his death and immediately after as the case may be, were owned by him absolutely, or were, in effect, "joint properties" of the Hindu undivided family. There is no evidence before the court, indeed the applicant has failed to show, sufficient for the court to hold that the properties held by the deceased during his lifetime or at the time of his death were joint properties of the undivided family. In fact evidence seems to show that the deceased was the sole coparcener vested with unqualified and absolute ownership of the properties both in India and Malaysia being the only son of his late father. There is no evidence before the court of the existence of any other female member who may be entitled to maintenance necessary to preserve the continuity of the character of such properties as joint properties of the Hindu undivided family. The deceased had no son at the time of his death and no male issue was born to him and his wife after his death and there was no adoption of any son prior to his death. I am therefore unable to find any material evidence sufficient for me to hold that there was constituted a joint family governed by the Mitakshara school of Hindu law. In that event I feel constrained to hold that the deceased held the properties both in India and Malaysia, movables and immovables, not as temporary owner of a Hindu undivided family but as sole coparcener having absolute ownership over such properties. May I now refer to a passage in Hindu Law by N.R. Baghavachariar, 4th ed., paragraph 261 under the heading "Property of the sole surviving coparcener" at page 262 where it is stated that —

F "Coparcenary property held by the sole surviving coparcener is his absolute property which he may dispose of by gift or will so long as he has no son, grandson or great-grandson except that, in the case of a will by him, if subsequent to his making the will and prior to his death he adopts a son or a son is born to him or to a deceased coparcener of his and is alive at the time of his death, the will becomes inoperative in respect of the coparcenary property though if that son dies during the testator's lifetime the will takes effect as if no son was ever born. Besides, a will by a sole surviving coparcener is inoperative on the birth of a posthumous son either to him or to a predeceased coparcener."

G

H Consequently I hold that as an absolute owner of the properties both in India and in Malaysia, the deceased was entitled to dispose of such properties by will. I further hold, in this regard I agree with Mr. Shankar's submission, that where the testator was domiciled in India and had made an Indian will, all questions of succession must be determined by Indian law. In support of the submission Mr. Shankar referred to certain passages in *Dicey on the Conflict of Laws* 8th edition and also the *English and Empire Digest* Vol. II (1975). For reasons that I have stated I cannot therefore accept the applicant's contention that the Hindu Succession Act, 1956 does not in the circumstances of this case apply to the disposal by the deceased by will of his immovable properties in Malaysia.

I

The remaining question that requires consideration is whether by virtue of the adoption deed the applicant now has a joint interest for the enjoyment of the properties in Malaysia held in the name of the deceased. The reasons I had set out earlier should in equal force apply. The applicant was not the deceased's adopted son at the time of the deceased's death. As the deceased was the absolute owner of the properties both in India and in Malaysia at the time of his death and was entitled to dispose of such properties in his will, there is no ground to warrant a finding that the ownership of the properties so disposed had not absolutely passed. In my view the widow inherited the properties disposed of by will absolutely as from the time of the death of the testator. Support for my finding may be found in another passage in *Raghavachariar* at page 1048 where it is stated that

"Under the Hindu Succession Act a woman who inherits her husband's estate or who has acquired property in any other way... becomes an absolute owner of the property, and if she subsequently makes an adoption the adopted son does not get any right in that property. The fact that the property was originally the ancestral property in the hands of her husband does not enable the adopted son to get an interest in that property."

For purposes of the present case further support may be found in one other passage in *Raghavachariar* at page 1045 under the sub-head "No divestment on adoption." It is revealed that under section 12 of the Hindu Adoptions and Maintenance Act, 1956 which seems to apply to the present case, "the adopted child shall not divest any person of any estate which vested in him or her before the adoption." It is also revealed, further down in that passage, that—

"... this section makes a significant change with reference to the effect of an adoption and says in the opening paragraph itself that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption. Therefore, the adoption cannot affect or divest the property, though originally belonging to the adoptive father who died possessed of the same, if before the adoption the property had become vested in somebody else..."

As regards the validity of the adoption deed, I accept the argument put forward by Mr. Shankar that as the deed purported to apply not only to Malaysian immovables but to all properties belonging to the widow therefore the deed ought to be registered as it was a non-testamentary instrument purporting to create present and future rights of immovable properties. The validity of such document must, I agree, be determined by Indian law under which it took place.

Finally, I would deal with the applicant's contention that the adoption by the law of the adoptive parents' domicile should be treated as a valid adoption in other countries for the purpose of the immovable properties in other countries. I have taken into consideration the following cases cited by Mr. Palasuntharam — *C.S. Nataraja Pillai (now deceased) & Anor. v. C.S. Subbaraya Chettiar*⁽¹³⁾ and *In re Valentine's Settlement — Valentine & Ors. v. Valentine & Ors.*⁽¹⁴⁾

I am conscious of the fact that the applicant's adoption was permitted by and was concluded according to the custom of the Nattukottai Chettiar caste

but what remains to be considered is the law that governs his right. For reasons that I stated earlier, it is my finding that the applicant had neither immediate right under section 12(c) of the Hindu Adoptions and Maintenance Act, 1956 nor retrospective rights.

The effect of adoption as provided under section 12 of the Hindu Adoptions and Maintenance Act is that the adopted child shall be deemed to be the child of his or her adoptive father or mother with effect from the date of the adoption. It is well provided under the proviso to this section that "the adopted child shall not divest any person of any estate which vested in him or her before the adoption." To conclude may I finally say that the properties disposed of by the deceased in the will were the properties which the deceased enjoyed absolute ownership and on the death of the deceased the properties so disposed whether they are in India or Malaysia had vested the widow and daughter absolutely. I am therefore unable to find favour with the applicant's claim. Whether the applicant will or will not have any right or interest in the widow's properties after the death of the widow is not for this court to consider at this point.

In the circumstances of this case it is my considered judgment that the application for revocation must necessarily fail and I therefore dismiss the application with costs.

As for Originating Motion No. 47/1973 I am satisfied, indeed I have found that the purported original will is the original will and I allow the application and order that it be admitted to probate with costs.

Consequently, in the light of my findings in this case, I allow Ramanathan Chettiar's application and grant the order as prayed for in the summons-in-chambers dated September 9, 1971 with costs.

Order accordingly.

Solicitors: V.K. Palasuntharam; Shearn, Delamore & Co.

**THE M.V. "YAMATO MARU";
M. V. "YAMATO MARU" OWNERS v.
S.P.I.E. SRI SURIA SDN. BHD.**

[O.C.J. (Arulanandom J.) May 10, 1976]

[Penang Admiralty in Rem No. 5 of 1976]

Shipping — Admiralty suit in rem — Ship chartered under bareboat charter party to charterers — Claim against charterers for goods supplied and services rendered — Owners terminating Bareboat Charter — Whether action in rem can be brought against vessel — Courts of Judicature Act, 1964, s. 24(b).

In this case the plaintiffs (respondents) had brought an action against the owners and all persons interested in the "Yamato Maru" for goods supplied and services rendered at the ports of Singapore and Malaysia. On the vessel's arrival at Penang it was arrested but the owners (applicants) made payment into court and the vessel was released. The ship had been chartered to the charterers, Sino Yamato Shipping Pte. Ltd. on a bareboat charter party. The owners had terminated the charter soon after the release of the ship